

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1244 of 1995**For Approval and Signature:****HON'BLE MISS JUSTICE R.M.DOSHIT**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to civil judge ?
- =====

PANDYA MAHASHANKER MOHANLAL SINCE DEECD.THRO HIS HEIRS - Applicant(s)
Versus
MODI VIRCHANDDAS MANGALDAS - Opponent(s)

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Appearance :

MR VC DESAI for Petitioner No(s).: 1.
MR PRAKASH K JANI for Respondent No(s).: 1.
MR KR RAVAL for Respondent No(s).: 1.

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CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT**Date : 02/08/2005****ORAL JUDGMENT**

Feeling aggrieved by the judgment and order dated 13th January, 1995 passed by the learned Joint District Judge, Mehsana in Regular Civil Appeal No. 124 of 1993,

the appellant, plaintiff in Regular Civil Suit No. 75 of 1986, has preferred the present Revision Application under section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 {hereinafter referred to as, "**the Rent Act**'}.

The petitioner-plaintiff is the owner of the suit shop bearing City Survey Sheet No.16, Nondh No. 3617, admeasuring 10.50 sq.m., situated at Kheralu. Under the Rent Note dated 12th November, 1976 [Exh.66], the suit shop was leased to the defendant for a monthly rent of Rs. 55/= for the purpose of carrying on the business. The plaintiff instituted Regular Civil Suit No. 75 of 1986 in the Court of learned Civil Judge [JD], Kheralu for recovery of possession of the suit shop on the grounds that the petitioner required the suit shop reasonably and *bona fide* for his personal use and that the defendant had not used the shop for one year preceding the date of the suit. The suit was contested by the defendant vide written statement Exh. 29. The defendant denied that the suit shop was closed, as alleged. According to the defendant, he was using the suit shop as a godown for storing the goods. Both the plaintiff and the defendant supported their case by leading oral evidence. The

learned Civil Judge, by judgment and order dated 22nd September, 1993, recorded finding against the plaintiff and dismissed the suit in favour of the defendant. Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 124 of 1993 in the Court of learned District Judge, Mehsana. The learned Joint District Judge dismissed the Appeal. The lower appellate court had held that the plaintiff had failed to prove that the suit shop was closed for six months preceding the date of the suit and that the defendant was using the suit shop as a godown. Therefore, the present Revision Application.

Mr. Desai has submitted that in answer to the notice dated 8th February, 1986 given by the plaintiff, the defendant gave reply dated 19th February, 1986 [Exh. 90]. In the said reply, the defendant made a categorical statement that the suit shop was not closed but was being used as godown. In the written statement also, the defendant raised a specific plea that he was using the suit shop as a godown. In his oral evidence Exh.100, he did admit that the suit shop was being used as a godown. However, he improved his defence to the extent that he was a grain-merchant and that as and when required, he used to store the grains in the suit shop and that the

suit shop was also used as a godown. In the submission of Mr. Desai, the defendant had improved his defence gradually from reply to the notice [Exh.90], to the written statement and to the oral evidence [Exh.100]. Mr. Desai has also submitted that the suit shop was taken on rent specifically for the purpose of doing business. Admittedly, the defendant had been using the suit shop as godown. It was, thus, admitted that the defendant was not using the suit shop for the purpose for which it was let. He has relied upon the judgment of the Hon'ble Supreme Court in the matter of **The Goa Urban Co-operative Bank Limited vs. Noor Mohd. Sheikh Mussa & Anr.** [JT 2004 (5) SC 265] and has submitted that in the matter of **Des Raj v. Sham Lal** [AIR 1980 Punjab & Haryana 229], the Punjab & Haryana High Court held that the use of a building as godown is distinct from the use as a shop. If a premises leased for the use as a shop is used exclusively as godown, it amounts to change of user. The said view of the Punjab & Haryana High Court has been approved by the Hon'ble Supreme Court. He has submitted that the defendant having taken the suit shop for running the business, if he uses the suit shop for storage of goods i.e. as a godown, the defendant can be said to have ceased to use the suit shop for the purpose for which it

was let. He has also relied upon Section 6 of the Rent Act. He has submitted that Section 6 of the Rent Act has specifically used the phrase, "**..premises let for residence, education, business, trade or storage.**" *Thus*, for the purpose of the Rent Act, business and storage are two different and distinct purposes for which a tenanted premises may be let. He has submitted that the defendant having failed to use the suit shop for the purpose for which it was let, the defendant is liable to be evicted from the suit shop.

Mr. Jani has contested the Revision Application. He has submitted that it was never the *plea* of the plaintiff that the defendant had failed to use the suit shop for the purpose for which it was let, or that the defendant was guilty of the change of user of the suit shop. He has submitted that the plaintiff had failed to prove that he required the suit shop for personal use and that the defendant had not used the suit shop. The plaintiff having failed to discharge the burden of proof, which lay upon him, the suit should necessarily fail. The Revision Application, therefore, requires to be rejected. Further, in absence of a specific plea of change of user raised by the plaintiff, the defendant had no opportunity to meet

the case of the plaintiff. He has submitted that the plea of change of user is raised for the first time in the present Revision Application. Mr. Jani has relied upon the judgment of the *Hon'ble* Supreme Court in the matter of **Jagdish Lal v. Parma Nand** [(2000) 5 SCC 44].

I am unable to agree with Mr. Jani. Section 13 (1) of the Rent Act enumerates the circumstances in which the landlord shall be entitled to recover possession of the leased premises. Clause (k) thereof reads as under :-

"..that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit; "

It should be noted that the Rent Act, or the aforesaid Section 13 [1](k) of the Rent Act does not specifically use the phrase "**non-user**" or "**change of user**". The aforesaid clause (k) is a composite *proviso* which would be attracted in the cases of non-user i.e. total non use of the leased premises as well as change of user i.e. not using the leased premises for the purpose for which it is let but using it for some other purpose.

Thus, all that the landlord is required is to establish that the leased premises was not used for the

purpose for which it was let. In the present case, it was the specific case of the plaintiff that the suit shop was always closed and was not being used. The said plea for the plaintiff was supported by the oral evidence of himself [Exh.65] and his brother [Exh.91]. Further, it was specific case of the defendant right since his reply dated 19th February, 1986 [Exh.90] that the suit shop was not closed but was used as a godown. In the written statement Exh. 29 also, he denied that the suit shop was kept closed. He, however, slightly improved his defence and stated that the suit shop was used as a godown also. In his oral evidence he improved his defence further. He deposed that at the relevant time he was carrying on business of buying and selling grains. The suit shop was taken on lease for the purpose of business and for storage. *Thus*, at all relevant times, the defendant did admit that during the period under consideration the suit shop was used as godown. It should be noted that the said plea was raised in answer to the allegation made by the plaintiff that the suit shop was kept closed and was not being used. It was the defendant who asserted that the suit shop was being used and was used as godown. The burden to prove the said assertion lay upon the defendant. Except the oral evidence given by the

defendant and his witness, the defendant did not produce any evidence of his carrying on the business in the suit shop during the period of six months preceding the date of the suit. Thus, the defendant failed to prove that he had used the suit shop for his business during the relevant period.

It is evident that, as agreed in the Rent Note Exh.66, the defendant had taken the suit shop on lease for carrying on business. As the plaintiff gave notice and alleged that the suit shop was kept closed and that the defendant was not using the suit shop, the defendant came out with a reply that the suit shop was being used as godown. Having realized that he had no right to use the suit shop as godown, he improved his defence. In the written statement, he made a statement that the suit shop was used for business and as godown also. Ultimately, in oral evidence, he deposed that he was a grain merchant and that the suit shop was taken on rent for the purpose of business and godown also. The said testimony is *ex facie* contrary to the rent note Exh. 66. As discussed hereinabove, the defendant did not produce any evidence to establish that during the relevant period any business was conducted in the suit shop or even goods were stored

in the suit shop. Moreover, as the defendant had admitted that he was using the suit shop as godown for storage of goods, the suit shop having been taken on rent for the purpose of business, nothing further was required to be proved by the plaintiff.

In view of the provision contained in Section 6 of the Rent Act and the above referred judgement of the Hon'ble Supreme Court in the matter of Goa Urban Cooperative Bank Limited, the purpose of carrying on business is different and distinct from the purpose of godown/storage.

In above view of the matter, it is established that the defendant had not used the suit shop without reasonable cause for the purpose for which it was let for a continuous period of six months immediately preceding the date of the suit. The plaintiff is, therefore, entitled to a decree for eviction as envisaged by Section 13 [1](k) of the Rent Act.

For the aforesaid reasons, the Revision Application is allowed with cost. The judgment and order dated 13th January, 1995 passed by the learned Joint District Judge,

Mehsana in Regular Civil Appeal No. 124 of 1993 is *quashed* and set-aside. Regular Civil Suit No. 75 of 1986 for recovery of possession of the suit shop is allowed. The plaintiff do recover vacant and peaceful possession of the suit shop from the defendant. The defendant do hand over vacant and peaceful possession of the suit shop to the plaintiff. Rule is made absolute.

At the request of the learned advocate Mr. Jani, it is directed that the decree for eviction passed against the defendant may not be executed till **3rd October, 2005**.

{Miss R.M Doshit, J.}

*Prakash**